Filed 12/10/08 Trisler v. LA Cty. MTA CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WILLIAM S. TRISLER, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B200770 (Los Angeles County Super. Ct. No. BC338881)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Affirmed.

Law Offices of Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte for Plaintiff and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Mary E. Reyna, Deputy County Counsel, for Defendant and Respondent.

* * * * * *

Appellant William S. Trisler worked for respondent Los Angeles County Metropolitan Transportation Authority (MTA) for 65 days before his employment was terminated. He sued MTA for disability discrimination, failure to accommodate and retaliatory discrimination. After his retaliation claim was dismissed, the balance of the case was tried to a jury, which found in favor of MTA. On appeal, appellant contends the trial court erred by (1) dismissing his retaliation claim, (2) denying his motion for new trial, (3) denying his motion for judgment notwithstanding the verdict, and (4) awarding attorney fees to MTA. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

In February 2000, two years prior to his employment with MTA, appellant had surgery on his left knee after a work-related injury. Following his surgery he had physical restrictions that included no repetitive squatting, climbing, crawling and kneeling. Appellant did not request an accommodation for his physical limitations from his two prior employers, both of which he claimed "wrongfully terminated" him.

On February 26, 2002, appellant applied for the position of rail equipment maintenance specialist with MTA. After undertaking a series of tests, appellant was interviewed by two supervisors, including Damon Cannon. During the interview, appellant stated that he had been injured on a prior job, that he had been put on light duty, and that he had quit when the light duty was no longer available. Appellant did not state that he had a disability or disclose any physical limitations.

Appellant received a job offer from MTA in late July 2002 conditioned on his passing a preemployment physical examination to determine that he could physically perform the duties of his position. On behalf of MTA, Dr. Nasser Mizban conducted the physical examination of appellant on July 29, 2002. As part of the physical examination, appellant filled out a "Medical Examination Report for Commercial Driver Fitness Determination," which is required by the California Department of Motor Vehicles and by Federal Motor Carrier Safety Regulations to confirm the applicant is physically

qualified. Appellant checked the box indicating that he had had an illness or injury in the last five years and wrote that he was taking Ultram and Vioxx. Although the report required appellant to elaborate on his response by providing the onset date, diagnosis, treating physician's name and address and current limitations, appellant left this section blank.

Appellant was also required to fill out a medical history questionnaire. He did not check the box indicating that he had a physical handicap. Additionally, appellant was required to complete a form entitled "Respirator Certification Program." Under question No. 6 asking whether in the past year appellant had been under the care of a physician and for what condition, appellant wrote "General Visits Physical." Appellant later admitted at trial that he failed to report that during the year prior to his filling out the form he had been treating with a specialist, Dr. Ralph Steiger, for his knee.

At the same time appellant applied for work with MTA, he also applied to another employer. Upon learning that appellant had undergone knee surgery, the other employer requested a permanent and stationary report from appellant's physician. On March 15, 2002, appellant obtained a note from his personal physician, Dr. Oliver Burrows, which stated that appellant had restrictions of "no repetitive squatting, climbing, kneeling, crawling or prolonged standing and walking." Dr. Burrows took these restrictions from a report made by Dr. Steiger two years earlier. Appellant admitted at trial that he never showed Dr. Burrows's note to Dr. Mizban or to anyone at MTA.

On or about June 17, 2002, appellant was arrested for assault and battery. Two days later at his arraignment he was released on his own recognizance on the condition that he enroll in an anger management class and not drive any vehicles. Appellant was ultimately convicted of misdemeanor battery on August 5, 2002, sentenced to a 30-day jail term to be served on consecutive weekends beginning August 23, 2002, and placed on three years probation. Prior to his arrest, on February 26, 2002 appellant signed MTA's "Authorization to Review Criminal History" form, indicating that he had no convictions and was not on any probation or parole. The form also asks if an applicant is presently released on bail or his own recognizance for any arrest for which a final

decision has not been made. Appellant signed the form again on July 29, 2002, but did not change his answer to this question from "no" to "yes." The form states that if an applicant is convicted of any crime prior to the date of employment, he is obligated to report the conviction to MTA, and failure to do so will be considered a false statement or concealment of facts that may result in disqualification or termination. Appellant never reported his conviction to anyone at MTA either prior to or after starting work on September 9, 2002.

The job description for appellant's position required that he be available to work any shift, including weekends, and to respond to emergencies 24 hours a day, seven days a week. Because of the nature of appellant's sentence, he could not meet this requirement. Appellant also drove to his preemployment processing with MTA in violation of the court's no-drive order. Had MTA known of appellant's conviction and sentence, it would not have employed him.

When appellant reported for work at MTA on September 9, 2002, he was greeted by the division shop steward, who explained that appellant would be on probation for 180 days and told appellant to come to him with any problems and that the union would try to help. During the 65 days that appellant was employed by MTA he never complained to the shop steward that he was having any physical problems, never told the steward that he was disabled, and never asked the steward for an accommodation.

Cannon, who was one of appellant's first supervisors, testified that he saw appellant "standing around way too much" while his coworkers did the work. Appellant never told Cannon that he was having trouble getting in and out of trains and never requested an accommodation. Anthony Lawson, one of appellant's relief supervisors, testified that he did not consider appellant to be a team player, found him resistant to performing the simplest tasks and lacking in initiative. Lawson also believed that appellant engaged in unsafe and inappropriate conduct, such as sitting on the roadway where trains were pulling out. Lawson likewise testified that appellant never mentioned any physical disabilities or that he was having trouble getting in and out of trains and never asked for an accommodation. Donato Pineda, one of appellant's coworkers and

another relief supervisor, testified that on the occasions he worked with appellant, he found appellant to be lazy, unhelpful, unmotivated and argumentative and appellant would disappear without explanation. Pineda testified that appellant never mentioned having physical restrictions or trouble getting in and out of trains and it never appeared to Pineda that appellant had trouble doing so.

Another one of appellant's supervisors, Elsa Edejer, received numerous complaints from appellant's other coworkers that he was unhelpful and would disappear. At least eight times when Edejer attempted to discuss these complaints with appellant, he said nothing, turned his back on her and walked away. On at least three occasions Edejer found appellant reading the newspaper when he was supposed to be working. During the time that she worked with appellant, Edejer had no idea he was disabled and he never asked her for an accommodation.

Ed Smith, the maintenance manager, made the decision to terminate appellant based on his discussions with appellant's supervisors. Appellant was terminated on December 13, 2002. Upon termination, appellant did not complain to Smith, Edejer or the shop steward that his termination was unfair because he was disabled.

Three days after he was terminated from MTA, appellant applied for employment with Inwesco, Inc. At trial appellant admitted that he lied on his employment application with Inwesco by stating that he had never been terminated from employment or convicted of a crime. Appellant was hired by Inwesco as a maintenance electrician. He did not inform Inwesco that he had a physical disability nor request an accommodation from Inwesco during the three months he worked there, even though he admitted at trial that the physical demands of the job were as great as his MTA job. On April 1, 2003, appellant suffered an industrial accident at Inwesco that put him in a wheelchair for months.

On or about December 11, 2003, appellant filed a claim of disability discrimination with the Department of Fair Employment & Housing (DFEH). His DFEH complaint alleged that he was terminated from his employment with MTA on December 13, 2002; Smith told him he was being terminated "for 'no one thing, just a lot

of small things'"; and he believed he was terminated due to his disability because MTA was aware of his disability at his time of hire, four days before he was terminated he informed MTA he was having trouble getting in and out of trains, MTA made no effort to accommodate him and he was never told he was having performance problems prior to his termination.

Procedural History

Appellant filed his original complaint against MTA on August 25, 2005. Following the sustaining of a demurrer with leave to amend, he filed the operative second amended complaint on April 6, 2006, alleging three causes of action under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) for disability discrimination, failure to accommodate and retaliatory discrimination. In its subsequent motion for summary judgment, MTA alternatively sought summary adjudication of appellant's retaliation cause of action on three grounds, including that it was barred by appellant's failure to exhaust his administrative remedies because his DFEH complaint failed to allege acts of retaliation. In denying the motion and finding that triable issues of fact existed, the trial court inexplicably did not address this particular ground.

Prior to trial, the parties each filed several motions in limine. As relevant here, the trial court granted MTA's motion to exclude all evidence of retaliation not listed in appellant's DFEH claim, which had the effect of dismissing his retaliation cause of action. The court denied appellant's motions to exclude evidence of his misdemeanor conviction and post termination employment and injury at Inwesco.

The case was tried to a jury over three days. At the end of appellant's case, the trial court asked whether there were going to be any motions, stating "I'm not encouraging motions. I just want to know for the record whether you're going to make any motions." MTA's counsel responded that if the court was not encouraging a motion for nonsuit, then MTA would not bring one. The jury returned a special verdict in favor of MTA, finding that while employed with MTA appellant did have a physical disability that affected his ability to work, but that MTA did not know of the disability.

Thereafter MTA sought to recover its attorney fees in the amount of $179,921,81. The trial court granted the motion for attorney fees on the ground that appellant's filing and maintenance of the action past the discovery stage was "frivolous, unreasonable or without foundation," but reduced the amount of the award to $150,000 "to be conservative." The trial court denied appellant's motions for new trial and for judgment notwithstanding the verdict. This appeal followed.

DISCUSSION

I. DISMISSAL OF RETALIATION CLAIM

Appellant contends that the trial court erred in dismissing his cause of action for retaliatory discrimination because (1) he did in fact exhaust his administrative remedies, and (2) a motion in limine was not a proper vehicle for dismissal of his claim. We find no error.

To bring a civil action under FEHA, a plaintiff must exhaust his administrative remedies by filing an administrative complaint with the DFEH and obtaining the DFEH's notice of right to sue. (Gov. Code, §§ 12960, 12965.) "To exhaust his or her administrative remedies as to a particular act made unlawful by the Fair Employment and Housing Act, the claimant must specify that act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) The failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect. (*Ibid.*; see also *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).)

Appellant concedes that his DFEH complaint does not mention retaliatory discrimination. But he cites to *Okoli* for the proposition that when an employee seeks judicial relief for incidents not listed in the original DFEH complaint, the judicial action may nevertheless encompass any discrimination "'like or reasonably related'" to the allegations of the DFEH charge. (*Okoli, supra,* 36 Cal.App.4th at pp. 1614, 1615 citing *Oubichon v. North American Rockwell Corporation* (9th Cir. 1973) 482 F.2d 569, 571.)

Okoli also cited to *Sanchez v. Standard Brands, Inc*. (5th Cir. 1970) 431 F.2d 455, 466, which essentially held that "if an investigation of what *was* charged in the [DFEH] would necessarily uncover other incidents that were not charged, the latter incidents could be included in a subsequent action." (*Okoli, supra*, at p. 1615.)

Appellant concludes that his DFEH complaint is reasonably related to his claim for retaliation because he alleged that he was terminated following his complaint to MTA that he was having difficulty getting in and out of trains. Appellant misunderstands the nature of a retaliation claim. As the *Okoli* court noted, it is an unfair employment practice under FEHA to retaliate against an employee because the employee has opposed *an unlawful employment practice* or has filed a complaint, testified or assisted in any proceeding involving such a practice. (*Okoli, supra*, 36 Cal.App.4th at p. 1613; Gov. Code, § 12940, subd. (h).) Appellant's DFEH complaint says nothing about his having opposed or complained about an unlawful employment practice, only that he complained about physical difficulties. Nor does appellant attempt to explain how an investigation into his allegations of disability discrimination would have uncovered his retaliation claim. We therefore find no merit to appellant's argument that his retaliation claim is reasonably related to his DFEH complaint.

We likewise find no merit to appellant's argument that it was improper for the trial court to dismiss his retaliation claim by way of a motion in limine. He cites to *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593 for the proposition that in limine motions are not designed to replace dispositive motions prescribed by the Code of Civil Procedure. But he ignores the rest of the opinion, which noted that despite the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have inherent power to use them in that way. (*Id*. at p. 1595.) In *Amtower*, the court held that the "procedural irregularity" of dismissing one of the plaintiff's claims on a motion in limine on the ground that it was barred as a matter of law by the statute of limitations was harmless where there was no evidence the plaintiff could produce to change that result. (*Ibid*.)

Similarly here, the question of whether appellant had exhausted his administrative remedies was simply one of law for the trial court. Appellant did not claim that he had any evidence on the issue that was necessary to its resolution. He simply made the argument that his retaliation cause of action was reasonably related to his DFEH complaint, an argument that is not legally viable. Accordingly, we find that appellant was not prejudiced by the dismissal of his retaliation cause of action on a motion in limine.

II. DENIAL OF MOTION FOR NEW TRIAL

Appellant next contends that the trial court abused its discretion in denying his motion for new trial. For the reasons that follow, we disagree.

Although appellant fails to cite the applicable statute, our review of the record reveals that appellant moved for a new trial on three grounds relevant here: improper admission of evidence which prevented him from having a fair trial (Code Civ. Proc., § 657, subd. (1)); insufficiency of the evidence to justify the verdict (Code Civ. Proc., § 657, subd. (6)); and the verdict was contrary to the law (Code Civ. Proc., § 657, subd. (6)). We review the denial of a motion for new trial for abuse of discretion. (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1800.)

A. Evidence of Misdemeanor Conviction

Appellant contends that the admission of evidence of his misdemeanor conviction deprived him of a fair trial because it was irrelevant and prejudicial. Appellant moved in limine to exclude evidence of his misdemeanor conviction on the grounds that it was more prejudicial than probative, it was inadmissible for impeachment purposes and MTA had failed to plead the affirmative defense of after-acquired evidence. MTA opposed the motion, arguing that the after-acquired evidence defense was embraced by the defense of unclean hands which had been pled, and that the evidence was admissible both to show appellant's unsuitability for employment and for impeachment purposes. The trial court

denied the motion in limine, agreeing that the evidence was relevant to the defense of unclean hands. Because MTA later agreed to withdraw its unclean hands defense, appellant argued in his motion for new trial that the only relevance of the evidence was to impeach the credibility of a witness and that this was an improper use of the evidence, citing to *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*).

MTA disputes that such evidence is inadmissible under *Wheeler*. But we need not decide this issue. In agreeing to withdraw its unclean hands defense, MTA's counsel argued that he still wanted to use the misdemeanor evidence to impeach appellant's credibility in his closing argument. Appellant's counsel did not object and agreed that the jury could "make a finding based on his credibility." Appellant thus appears to have waived his challenge to admission of the evidence for the purpose of attacking his credibility. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1 ["'An appellate court will ordinarily not consider procedural defects or erroneous rulings, . . . where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver'"].)

Even in the absence of waiver, appellant asserts on appeal that the prejudice he suffered by the admission of the evidence "is clearly illustrated by comments of the trial court during the hearing on [MTA's] motion for attorney's fees and the court's ruling on the motion for attorney's fees." Not only does appellant fail to explain how the court's ruling on a posttrial motion affected his right to a fair jury trial, he cites to no authority permitting a new trial motion to challenge a posttrial award of attorney fees. Nor did appellant make this prejudice argument below. To the contrary, appellant made no attempt in his motion for new trial to demonstrate any prejudice by admission of the evidence. "[I]rrelevant evidence is not a ground for a new trial in the absence of a showing that the movant for a new trial was prejudiced by the evidence." (*Townsend v. Gonzalez* (1957) 150 Cal.App.2d 241, 249–250.)

Accordingly, appellant has failed to establish that admission of the evidence of his misdemeanor conviction was improper.

B. Evidence of Inwesco Employment

Appellant also contends that the admission of evidence of his subsequent employment with Inwesco deprived him of a fair trial. Specifically, he argues that the evidence he failed to inform Inwesco that he was disabled or to request an accommodation from Inwesco, as well as evidence of his industrial injury suffered while employed by Inwesco, was both irrelevant and prejudicial.

Appellant first sought to exclude this evidence by way of motions in limine. MTA opposed the motions, arguing the evidence was relevant to the issues of whether appellant was in fact disabled while employed by MTA and, if so, whether he concealed information about his disability from MTA. The trial court agreed and denied the motions.

Appellant argues the evidence that he failed to inform Inwesco of his disability or to request an accommodation from Inwesco comprised inadmissible character evidence under Evidence Code section 1101, subdivision (a), which provides that evidence of a person's character or a trait of his character is inadmissible when offered to prove his conduct on a specified occasion. But appellant makes no persuasive arguments to support his position. Moreover, he ignores subdivision (b) of Evidence Code section 1101, which allows the admission of evidence to prove some fact such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." Without referring to this specific subdivision, appellant simply asserts that the evidence presented at trial did not demonstrate any common plan to deceive because there was no evidence that he "failed to notify prospective employers about his disability prior to his employment with [MTA]." But the evidence presented at trial showed that appellant failed to ask for an accommodation from his actual employer immediately prior to MTA, that he failed to disclose his disability or ask for an accommodation from MTA, and that he failed to disclose his disability or ask for an accommodation from his

subsequent employer, Inwesco. Such acts can reasonably be said to constitute a common plan to deceive.

Appellant also asserts that such evidence was inadmissible to attack his credibility. But, again, he ignores subdivision (c) of Evidence Code section 1101, which provides that nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Even if it were error to admit this evidence, appellant has not demonstrated prejudice. He simply concludes the evidence affected the outcome of the trial because the jury ignored the uncontroverted evidence that he gave MTA notice of his disability. As we discuss below, this evidence was indeed controverted.

Appellant also argues the evidence that he suffered an industrial injury at Inwesco was irrelevant to the issue of whether he was disabled while working at MTA because the work conditions were different. But appellant admitted at trial that the physical demands of both jobs were the same. Moreover, appellant cannot demonstrate any prejudice by admission of this evidence because the jury found that appellant *was* disabled while working for MTA.

C. Insufficiency of the Evidence

Appellant contends that he should have been granted a new trial on the basis that the evidence was insufficient to support the verdict. "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

Appellant asserts that because the jury found that he was disabled during his employment with MTA, the critical question was whether MTA had notice of his disability. He claims the jury's finding that MTA had no such notice was contrary to the evidence. First, appellant relies on his own self-serving testimony that he placed Dr. Mizban on notice of his physical disability, including his physical restrictions, during

his preemployment physical examination. Appellant argues that MTA's failure to call Dr. Mizban to testify at trial renders appellant's testimony uncontroverted. But appellant ignores his own testimony on cross-examination, which, as MTA points out, casts considerable doubt on his veracity. For example, appellant admitted that he did not disclose to Dr. Mizban that he had been seen by a specialist regarding his knee in the prior year, and he admitted that he did not give anyone at MTA, including Dr. Mizban, Dr. Burrows's note outlining appellant's physical restrictions. There was also evidence that appellant did not check the box on his medical history questionnaire indicating that he had a physical disability.

Appellant next argues that his supervisor, Edejer, was a spoliator of evidence because she testified that she discarded portions of her personal planner before she knew appellant had filed a charge of discrimination against MTA, and therefore all inferences should be drawn that Edejer was not truthful when she testified that appellant never told her he had a disability or requested an accommodation. We reject this argument. Appellant's claim that Edejer testified that she discarded only the favorable comments about appellant and retained the negative comments upon learning of his charge is not supported by the record. Edejer denied the accusation at trial. Moreover, the evidence also supported the inference that Edejer discarded portions of her personal planner that also contained negative entries about appellant, as reflected by simultaneous negative entries made by Edejer on appellant's training log.

Appellant also claims the "inference" from Cannon's testimony is that appellant told him about his physical disability and that such "evidence" was not contradicted. In this regard, appellant is referring to Cannon's testimony that appellant stated during his preemployment interview that he had been injured on his prior job and put on light duty. But appellant ignores Cannon's further testimony that appellant never told him he had a disability and never requested an accommodation. Thus, contrary to appellant's assertion, this so-called evidence was in fact controverted.

Moreover, appellant's entire argument simply ignores the substantial evidence in favor of the verdict, including the documentary evidence and the testimony by appellant's

supervisors and coworkers at MTA that he did not inform them he had a physical disability or request an accommodation. We simply find no merit to appellant's claim that because the trial court did not grant his motion for new trial on the ground of insufficiency of the evidence that it necessarily failed to reweigh the evidence and draw reasonable inferences in his favor.

D. Against the Law

Appellant also contends that the jury's verdict was against the law because it ignored the evidence adduced at trial. A jury's verdict is against the law only where the evidence is without conflict in any material point and is insufficient as a matter of law to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.) Under this ground, the court does not reweigh the evidence, as it does in considering the ground of insufficiency of the evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.)

To support his contention, appellant simply relies on the same evidence he cited in his prior argument that the evidence was insufficient to support the verdict. Because we have already concluded that this evidence was controverted, and that substantial evidence in fact supported the verdict, we find no merit to appellant's contention that the verdict was against the law

III. DENIAL OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Appellant contends that the trial court erred in denying his motion for judgment notwithstanding the verdict. Without citing to the applicable statutory or other relevant authority, he simply concludes that the verdict is unsupported by the evidence and that he met his burden of proving that MTA failed to reasonably accommodate him and discriminated against him on the basis of his physical disability. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and

citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

IV. AWARD OF ATTORNEY FEES

Appellant contends that the trial court abused its discretion in ordering him to pay MTA's attorney fees because it (1) improperly engaged in post hoc reasoning to justify the award, and (2) failed to consider his ability to pay and to make written findings on this factor. We find no abuse of discretion.

A. Post Hoc Reasoning

Government Code section 12965, subdivision (b) authorizes a court, in its discretion, to award reasonable attorney fees and costs to the prevailing party in an action brought under FEHA. While prevailing plaintiffs in antidiscrimination cases are routinely awarded attorney fees, a prevailing defendant should only be awarded such fees based upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1392 [adopting the standard set forth in *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421].) The Supreme Court cautioned that in applying these criteria, trial courts should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail at trial, his action must have been unreasonable or without foundation," since such hindsight logic would deter all but the most "airtight" claims. (*Christianburg, supra,* at pp. 421–422.)

Where a plaintiff intentionally has distorted the facts or continuously has sought to avoid adverse legal rulings by submitting renewed motions on the same subject matter as previously denied motions, attorney fees may be awarded against a plaintiff. (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 831–832; see also *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1229–1230

[misrepresenting the facts is a basis for finding that a FEHA action was groundless or frivolous].)

Appellant essentially argues that the trial court's denial of MTA's motion for summary judgment and its discouragement of MTA's bringing a motion for nonsuit amounted to a finding that his claims were not frivolous. But there is no authority for appellant's argument. Indeed, in *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 866 (*Rosenman*), upon which appellant relies, the court stated: "[W]e decline to establish a bright-line rule whereby a plaintiff who survives a motion for summary judgment or nonsuit can *never* be liable for attorney fees. Such a rule would unjustifiably shield those plaintiffs who are able to raise a triable issue of fact, even though it be by means of fabricated evidence and false testimony." See also *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 923, where the court stated: "Declarations sufficient to create a triable issue in a summary judgment proceeding may, in the crucible of a trial, be revealed to be spurious and the litigant's claim frivolous, unreasonable and without foundation."

Appellant next seizes on the trial court's statement in its written ruling that it agreed with the jury that appellant did not tell MTA that he had a physical disability, arguing that this demonstrates the court's improper post hoc reasoning and that its basis for the award was "the relative credibility of witnesses." But the court made clear both in its written ruling and at the hearing on the motion for attorney fees that this case was not simply a matter of a credibility contest. To the contrary, the court concluded, and the record amply supports, that appellant was not honest with MTA about having physical restrictions or a criminal history when applying for employment. The court's detailed written ruling makes clear that the court was focused on the facts that appellant knew prior to filing his suit against MTA, which demonstrate that appellant's claims were without foundation. "If the false and unfounded nature of such a plaintiff's claims is revealed at trial, the prevailing defendant should be able to recoup its attorney fees to the extent the plaintiff is able to pay." (*Rosenman, supra*, 91 Cal.App.4th at p. 866.)

The cases upon which appellant relies are distinguishable. In *Rosenman* the appellate court reversed an award of attorney fees to the prevailing defendant in a pregnancy discrimination case, finding that the plaintiff had not deceived her employer as to her condition, presented credible evidence from multiple sources that she was temporarily disabled by her difficult pregnancy and needed accommodation and presented both expert and percipient testimony to support her claim that she was not given reasonable accommodation. (*Rosenman*, *supra*, 91 Cal.App.4th at p. 871.) By contrast here, the evidence supports the finding that appellant deceived MTA when he applied for employment by not disclosing his physical disability—he did not present MTA with Dr. Burrows's note outlining his physical restrictions yet he relied upon this note at trial to prove his physical disability, he did not reveal that he had seen a specialist for his knee in the prior year despite being asked about this on one of the forms he was required to complete, and he checked the box on his medical history questionnaire indicating that he did not have a physical disability—and that he lied to MTA about not having a criminal record. Appellant did not present percipient or expert testimony from any witness, let alone credible evidence from multiple sources, that he needed accommodation. He called only his personal physician, Dr. Burrows, whose list of appellant's physical restrictions was taken largely from a report made by another doctor two years earlier. Similarly, in *Jersey v. John Muir Medical Center*, *supra*, 97 Cal.App.4th 814, the appellate court reversed an award of attorney fees finding that while the plaintiff ultimately failed to adduce any evidence of sex discrimination, she did not distort the facts and her discrimination claim was merely an attempt to articulate a different legal theory to support her contention that her employer had wrongfully terminated her for proceeding with another lawsuit. (*Id*. at pp. 831–832.)

We cannot conclude that the trial court erred in finding that appellant's filing and maintenance of the action past the discovery stage was "frivolous, unreasonable, or without foundation."

B. Ability to Pay

In *Rosenman*, the appellate court was persuaded by the argument that requiring a written decision by the trial court detailing the findings in support of an attorney fees award to defendants in civil rights cases would serve the important public policy of ensuring that such fees are awarded only in rare cases that are truly frivolous, unreasonable or without foundation, so as to avoid discouraging litigants from bringing meritorious but not airtight claims. (*Rosenman*, *supra*, 91 Cal.App.4th at p. 868.) The *Rosenman* court therefore imposed a "nonwaivable" requirement that a trial court make written findings that a plaintiff's action was frivolous, unreasonable or groundless in all FEHA cases where attorney fees are awarded to a defendant. (*Ibid*.) The court stated that "where the required findings are not made by the trial court, the matter must be reversed and remanded for findings, unless the appellate court determines no such findings reasonably could be made from the record." (*Ibid*.) In a footnote, the court added: "The trial court should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation. As the Ninth Circuit Court of Appeals held in *Patton v. County of Kings* (9th Cir. 1988) 857 F.2d 1379, 1382, the trial court 'should consider the financial resources of the plaintiff in determining the amount of attorney's fees to award to a prevailing defendant.' We wholeheartedly agree with the Ninth Circuit's holding an award of attorney fees '"should not subject the plaintiff to financial ruin."'" (*Id*. at pp. 868–869, fn. 42.)[1]

Appellant is correct that the trial court here did not make written findings regarding his ability to pay attorney fees, but we disagree that this omission requires the matter to be remanded. At the hearing on the motion for attorney fees, appellant's attorney attempted to raise the issue by pointing out that a court is to "look at the ability

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1 We note that the *Patton* court cited to *Miller v. Los Angeles County* (9th Cir. 1978) 827 F.2d 617, 621, fn. 5, which stated that "a district court should not refuse to award attorney's fees to a prevailing defendant . . . solely on the ground of the plaintiff's financial situation."

to pay." In response, the court referred to appellant's trial testimony, which included the following: "Q. Okay, Mr. Trisler, is it a true statement that you are so rich you really don't need to make another dime in your entire life? [¶] A. That's true. [¶] Q. Okay. And it's true that you have extensive holdings in real estate and stocks and bonds and annuities; correct? [¶] A. Me and my wife do, yes. [¶] Q. Nothing further." The court then concluded, "So I think that base is covered." Appellant's attorney did not further address the issue.

We agree with the *Rosenman* court that the better course of practice is for trial courts to make written findings on all factors that support an award of attorney fees to a defendant in a FEHA case, including the ability to pay attorney fees. But where, as here, the record makes clear that the trial court considered appellant's ability to pay, we are satisfied that the public policy of not discouraging meritorious FEHA claims has been respected.

Appellant cites to his half-page declaration in opposition to the motion for attorney fees as "uncontroverted" evidence of his inability to pay. His declaration states that he has been out of work since his industrial injury in April 2003, that he derives a monthly income of $820 from disability payments and that he and his wife struggle to pay their bills. But appellant's trial testimony contradicts his declaration, and appellant made no attempt to address his trial testimony.

We find no abuse of discretion in the trial court's award of attorney fees to MTA.

DISPOSITION

The judgment is affirmed. MTA is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST